had been raised had reached the contrary result.[10] Subsequent decisions in state courts have refused to follow it.[11] The undesirability, as a matter of economics, of the predatory price-cutting to which the decision gave rise, can scarcely be denied.[12] Yet perhaps the case has become too firmly fixed as a principle of decision in the federal courts to make it desirable to overrule it at this late date and perhaps the remedy is now rather for the legislature.[13] But even so, that is not a valid reason for introducing a new technical distinction into a field of judicially interpreted public policy which has already become stigmatized by an adherence to the letter rather than the spirit. Having decided the Colgate case as it was decided, it seems unfortunate that the Supreme Court did not go the full distance and overrule the Miles case. As the decisions stand, the Colgate case is an exception to an undesirable rule, and the existence of a bad rule has been prolonged altogether too often in the law by the multiplication of virtuous exceptions.

THE CONCURRENT POWER OF CONGRESS AND THE SEVERAL STATES TO ENFORCE THE EIGHTEENTH AMENDMENT. — The Eighteenth Amendment[1] prohibits traffic in "intoxicating" liquors and provides that "Congress and the several States shall have concurrent power to enforce" the prohibition. There is a dispute as to the significance of the phrase "concurrent power," and more particularly as to who has the power to define "intoxicating." Litigation on these points seems certain to arise out of the legislation of at least four states,[2] which has set a standard at variance with that adopted in the National Prohibition Act.[3]

Three views are possible: (1) That concurrent power means joint power. (2) That the power is given to each, the legislation of either Congress or the states being of equal force with the other. (3) That the power is in each, but that the legislation of Congress, as the supreme law of the land, will supersede any inconsistent state legislation.

---

[10] Elliman Sons & Co. *v.* Carrington & Son, L. R. 2 Ch. 275 (1901); Grogan *v.* Chaffee, 156 Cal. 611, 105 Pac. 745 (1909); Garst *v.* Harris, 177 Mass. 72, 58 N. E. 174 (1900); New York Ice Co. *v.* Parker, 21 How. Pr. (N. Y.) 302 (1861).

[11] Ghirardelli Co. *v.* Hunsicker, 164 Cal. 355, 128 Pac. 1041 (1912); Fisher Flour Milling Co. *v.* Swanson, 76 Wash. 649, 137 Pac. 144 (1913).

[12] An enlightening account of this economic effect can be found in the hearings on the Stevens Bill (H. R. 13305) before the Committee on Interstate and Foreign Commerce in the House of Representatives, 63rd Congress, 2nd and 3rd Sessions (Feb. 27, 1914, to Jan. 9, 1915).

[13] See the opinion of Mr. Justice Brandeis in Boston Store of Chicago *v.* American Graphophone Co., 246 U. S. 8, 27 (1918).

[1] See 40 STAT. AT L. 1050. For the purposes of this note the validity of the amendment itself is assumed. See William L. Marbury, "Limitations upon the Amending Power," 33 HARV. L. REV. 223; William L. Frierson, "Amending the Constitution of the United States," 33 HARV. L. REV. 659. Power to define "intoxicating" under the power to enforce is also assumed. *Cf.* Ruppert *v.* Caffey, 251 U. S. 264 (1920).

[2] Maryland, New Jersey, New York, and Massachusetts. Maryland's statute is expressly conditioned on its validity under the amendment. New York and Massachusetts have bills pending.

[3] Volstead Act, October 28, 1919.

Upon the first theory, no law would be effective until the legislation of Congress and the state in question coincided. But the amendment was surely intended to mark an advance in the possible control of intoxicating beverages. This view not only leaves Congress practically powerless, but deprives the several states of the independent power which they had previously. The theory that the power is joint must be untenable.

The conception that the power to enforce is equally in each, neither having any overriding force, is more interesting. It presents a legislative situation analogous to the judicial situation existing between a state court and the federal court, applying the law in the same state.[4] The situation would also resemble that where two adjoining states are given concurrent jurisdiction over a river which forms a common boundary,[5] or where a state cedes land to the United States reserving concurrent jurisdiction in certain respects.[6] These analogies would seem to support this view. The more restrictive law would be enforced, however, by the government enacting it[7] and so would in a sense supersede the more lenient law so far as the latter impliedly authorized the acts which the former condemned. The principal objection to this second theory is that it renders the acts of Congress, passed in pursuance of the Constitution, less than the supreme law of the land.[8]

Does the third possible meaning deprive the words "concurrent power" of all significance? [9] That cannot be true if the words had, at the time of the adoption of the amendment, a recognized meaning with exactly the force contended for, and such, it is submitted, is the case. The word "concurrent" appears several times in the Constitution,[10] but not the phrase "concurrent power." The words have been used together, however, by counsel in argument and by the courts in their decisions, to describe those powers which, although delegated to the United States, may yet be exercised by the states, until Congress chooses to act.[11] They describe those powers which the state may exercise, but only in absence of federal legislation on the point, as distinguished from powers which were delegated to the United States and could be exercised only by the United States. It was part of the significance of the phrase that, although the power was concurrent in the state, inconsistent state laws

---

[4] See Swift *v.* Tyson, 16 Pet. (U. S.) 1 (1842).

[5] See State *v.* Neilsen, 51 Ore. 588, 95 Pac. 720 (1908); Wedding *v.* Meyler, 192 U. S. 573 (1904).

[6] See Fort Leavenworth Rd. Co. *v.* Lowe, 114 U. S. 525 (1884); Opinion of Judges, 1 Met. (Mass.) 580, 582 (1841).

[7] State *v.* Nielsen, *supra.*

[8] See U. S. CONST., Art. VI, "This Constitution, and the laws of the United States which shall be made in pursuance thereof, . . . shall be the supreme law of the land."

[9] The argument for the affirmative is that without the words in the amendment, the states could have passed legislation in enforcement of it. This seems true; the state might have made a violation of the National Prohibition Act an offense against the state. *Cf.* Fox *v.* Ohio, 5 How. (U. S.) 410 (1847); Houston *v.* Moore, 5 Wh. (U. S.) 1 (1820); State *v.* Tachin, 92 N. J. L. 269, 106 Atl. 145 (1919). But the words do settle any doubt as to the power of the states to legislate on subjects uncovered by Congress.

[10] See U. S. CONST., Art. I, §§ 3 [6], 5 [2], 7 [1], 7 [3]; Art. II, § 2 [2].

[11] See Sturges *v.* Crowninshield, 4 Wh. (U. S.) 122 (1819); Houston *v.* Moore, 5 Wh. (U. S.) 1, 5, 8, 29, 34, 49 (1820); Gibbons *v.* Ogden, 9 Wh. (U. S.) 1, 13, 36–40 (1824); Bridge Co. *v.* Kentucky, 154 U. S. 204, 211 (1893).

were superseded by a federal law on the matter, by force of the Constitution itself.

The third theory seems preferable. It will result in a uniform enforcement of the first section of the amendment; the word "intoxicating" will not be credited with forty-nine possible meanings; and the states may still legislate on subjects not covered by federal statutes and consistently with Congress.[12] It may be said that for all practical purposes there is no substantial distinction between the second and third views, but theoretically the third theory gives the words their recognized legal meaning, does no violence to Article VI of the Constitution, and averts any possibility of future state laws expressly or impliedly authorizing that which Congress forbids.

REMOVAL OF CAUSES. — The plaintiff whose cause of action arises out of the negligence of an employee will usually desire to make the employer the responsible party. And he will usually be equally desirous of establishing that responsibility in his own state courts. Said Bourquin, J., in a recent case: "So long as eight of twelve jurors may render verdicts in state courts, and twelve of twelve are necessary in federal courts, plaintiffs will try to retain causes in the former courts and defendants to remove them to the latter." [1] Nor is that the sole reason actuating defendants, particularly in cases of tort where sympathy lies altogether with the other party. In federal courts material advantage may be gained from rights not available in many states: the opinion of the judge upon the facts; [2] the direction of a verdict though there be a scintilla of evidence.[3]

In order to prevent removal the practice has become familiar for the plaintiff to join the employee — when he is a fellow citizen — as co-defendant with the non-resident employer. If the interests then involved are joint the federal courts cannot acquire jurisdiction, because all the persons concerned are not competent to sue, nor liable to be sued, in those courts.[4] There may be removal, however, by such defendants as are of diverse citizenship when the interests are separable.[5] The cause is separable upon which, as against the defendants seeking removal, a distinct suit might have been brought and complete relief afforded without all of the original defendants.[6] A cause would seem always to

[12] Opinion of the Judges, 77 Leg. Int. 117 (1920).

[1] See Zigich *v.* Tuolumne Copper Mining Co., 260 Fed. 1014, 1015 (1919). See RECENT CASES, p. 985.

[2] Simmons *v.* United States, 142 U. S. 148 (1891).

[3] Ewing *v.* Goode, 78 Fed. 442 (1897).

[4] Marshall, C. J., in Strawbridge *v.* Curtis, 3 Cranch (U. S.), 267 (1806).

[5] See 18 STAT. AT L. 470.

[6] Barney *v.* Latham, 103 U. S. 205 (1880). A suit may, under correct pleading, as this case shows, embrace several distinct controversies and yet be removable in its entirety on the ground that one of them is separable from the rest. The terms "joint" and "several" are not applied to the parties defendant but to the controversies against them. Thus, when the resident employee's liability is rested solely upon non-feasance and no duty to the plaintiff is shown, the motion to remove need not raise the question of the nature of the controversy if preceded by a motion to strike out the party misjoined. See Prince *v.* Illinois Cent. Ry., 98 Fed. 1 (1899). On the other hand, the joinder of the parties being proper, a removal will be granted so long as the contro-